The Owners and/or Demise Charterers of the Ship or Vessel 'Edzard Schulte' v The Owners and/or Demise Charterers of the Ship or Vessel 'Setia Budi'

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM SUIT NO WA-27NCC-33–07 OF 2022
ONG CHEE KWAN J
2 AUGUST 2023

Companies and Corporations — Scheme of arrangement — Restraint of proceedings — Applicability of moratorium under scheme of arrangement to in rem claims — Personification theory — Procedural theory — Defendant filed application for leave of court to convene creditors' meeting in relation to proposed scheme of arrangement — Defendant obtained restraining orders in relation to all current and further proceedings pursuant to s 368(1) of Companies Act 2016 except with leave of court — Plaintiff filed writ in rem action against defendant's vessel — Whether plaintiffs' writ in rem action which arose from claim based on maritime lien subjected to restraining order — Whether leave of court was required before filing of writ in rem action — Whether court should grant leave be it nunc pro tunc or otherwise — Whether court vested with jurisdiction to grant leave or whether application for leave ought to be filed before court which heard defendant's application to convene creditors' meeting in relation to proposed scheme of arrangement — Companies Act 2016 ss 2(1), 366(1), 368(1) & (2)

The present case raised the issue of whether the moratorium under a scheme of arrangement applied to in rem claims as the wordings of s 368(1) of the Companies Act 2016 ('the CA') referred to 'restrain further proceedings in any action or proceeding against the company except by leave of the court'. In deciding this issue, the court had considered two theories, firstly the 'personification' theory, and secondly, the 'procedural' theory in relation to its application to maritime liens. The plaintiff was the owner of a vessel known as Edzard Schulte whereas the defendant was the owner of a vessel known as Setia Budi. The dispute between the parties stemmed from a maritime incident whereby the defendant's vessel which at the material time was towing an accommodation barge had caused the said accommodation barge to allide into the plaintiff's vessel. The plaintiff then proceeded to commence the present in rem action ('the writ in rem') against the defendant and subsequently obtained warrant of arrest of the defendant's vessel without knowing that the defendant had initially filed an application to the court ('the first Scheme Court') for leave to convene meetings of creditors in relation to a proposed scheme of arrangement pursuant to s 366(1) of the CA. The defendant had also obtained a restraining order pursuant to s 368(1) of the CA which in effect restrained

and stayed all current and further proceedings in any legal actions or proceedings against the defendant and/or assets of the defendant except by leave of the court ('the first restraining order'). The plaintiff had only discovered about the first restraining order when the defendant filed their application to strike out the writ in rem and the warrant of arrest. The plaintiff then filed encl 33 to obtain the court's order that the plaintiffs' commencement of the writ in rem did not require any leave from the court under the first restraining order and as an alternative prayer, the plaintiffs also sought for leave *nunc pro tunc* to commence and maintain this action and the arrest. As the first restraining order had already expired when encl 33 was filed, the defendant had obtained from the court ('the second Scheme Court') a fresh restraining order ('the second restraining order') which had similar terms with the first restraining order. The defendant sought to rely on the second restraining order to oppose encl 33. The issues arose in encl 33 were as followed: (a) whether the plaintiffs' writ in rem which arose from a claim based on maritime lien was subjected to the first restraining order and/or the second restraining order; (b) if the answer to (a) was in the affirmative and leave was required under the first restraining order and/or the second restraining order, whether the court should grant the plaintiff leave, be it *nunc pro tunc* or otherwise; and (c) whether the court was vested with the jurisdiction to grant the leave or that the application for leave ought to be filed before the first Scheme Court or the second Scheme Court as the case may be.

Held:

(1) The words 'further proceedings' in 'all current and further proceedings' in the first restraining order surely could not be taken to mean further proceedings from the current and existing proceedings as suggested by the plaintiff for the simple reason that once the 'current' proceedings were stayed, there could be no 'further proceedings' from the 'current proceedings'. Thus, the words 'further proceedings' must necessarily referred to 'future proceedings' that were distinct from the 'current' proceedings. Further, it was clear that the reference to winding up in the first restraining order was a reference to future proceedings against the company since there was no existing winding up proceedings filed against the applicants. The scope of the first restraining order also acted pre-emptively against proceedings that had yet been commenced. Accordingly, the court rejected the plaintiff's contention that the plaintiffs' writ in rem, not being an action existing at the time of the first restraining order but filed on 11 July 2021, fell outside the scope of the first restraining order (see paras 47–49).

(2) The court could not accept the plaintiff's contention that the filing of the writ in rem was not 'proceedings' under s 368(1) of the CA or the first restraining order. The court was of the view that a plain and ordinary meaning to the word 'proceedings' must necessarily include the

commencement of legal actions which included actions commenced by the ordinary legal process, be it by writ of summons, originating summons and/or writ in rem (see paras 57 & 59).

(3) Under the 'personification' theory, the court viewed the vessel as a jural entity and arrested the vessel to start an in rem proceeding that fixed the liability of the vessel rather than the liability of the shipowner. The 'procedural' theory treated the seizure of the vessel as a device to coerce the owner to answer and the action was deemed as an in personam action against the shipowner at the time of commencement. In the present case, the court was of the view that unlike a claim based on a statutory lien where an in rem action based thereon was merely a procedural device to enable the claimant to create a security interest for its claim, an in rem action based on a maritime lien was a 'pure' in rem claim in the sense that a proprietary right was attached to the vessel at the time when the claim arose by operation of law and the claim was directed against the res and not the shipowner. Therefore, the court should recognise and adopt the personification theory in an in rem action based on maritime liens. Based on the above findings, the court agreed with the plaintiff that the first restraining order did not apply to the in rem action filed by the plaintiff against the vessel, the warrant of arrest or the execution of the arrest because the plaintiff's claim here was based on maritime lien, which was a pure in rem action (see paras 73–74, 87, 92 & 95).

(4) Section 368(1) of the CA referred only to in personam action or proceedings against the company. Accordingly, the reference to the assets of the defendant in the first restraining order must be construed to mean proceedings against the assets of company in an in personam action and not in rem action. Further, the court disagreed with the defendant that the first restraining order covered a claim based on maritime lien and/or statutory lien since para 3(iv) of the order referred to the exercise or intended exercise of 'any liens, securities …'. This was because, maritime lien arose automatically by operation of law at the time of the relevant event, in this case, the allision which occurred on 12 January 2021. It was not based on any security documents (see paras 96–100).

(5) Based on the above findings, it was the court's judgment that in respect of the commencement and filing of the writ in rem, the plaintiffs did not require any leave from the first Scheme Court under the first restraining order. However, leave was required once the defendant chose to enter appearance on 4 November 2022, if the plaintiff desired to proceed with the in personam action against the defendant. This however was no longer a live issue before the court at the time of the hearing of encl 33 given that the first restraining order had expired on 19 November 2022 (see paras 101–102 & 107).

(6) The second restraining order was not an 'extension' of the first restraining order because based on s 368(2) of the CA, the maximum period that the defendant could obtain in respect of a restraining order was 12 months. Therefore, the second restraining order was in fact a new and fresh restraining order. In any case, for the same reasons given above, the court ruled that the second restraining order also did not cover the plaintiff's current writ in rem action against the defendant's vessel and would only require the plaintiff to seek leave to continue with the proceedings in respect of the in personam action against the defendant (see paras 108–110).

(7) The defendants had not demonstrated that the granting of leave to the plaintiffs to continue with the present writ in rem action would in any way impede the successful implementation of the proposed scheme of arrangement. In fact, the defendant had acknowledged that the defendant's vessel did not appear to play any significant part on the defendant's proposed scheme of arrangement at all. Further, the facts suggested that the defendant had clearly abandoned the vessel. As a secured creditor with a proprietary interest, the plaintiffs should not be prevented from exercising its property rights if doing so was unlikely to impede the company's attempts to restructure. For these reasons, the court had granted leave to the plaintiff under the second restraining order to continue with the in personam proceedings in the writ in rem action and to maintain arrest (see paras 116–120).

(8) The second Scheme Court that heard and granted the application for the proposed scheme of arrangement and second restraining order did not have exclusive jurisdiction to hear the application for leave. Indeed, the 'Court' in the CA was defined in s 2(1) of the CA to mean 'the High Court or a judge of the High Court'. Thus, any High Court or a judge of the High Court may hear and grant the leave application. In addition, given the certainty that the second Scheme Court would invariably grant leave to the plaintiffs to continue with the current writ in rem action owing to the concession made by the defendant to exclude this action from the second restraining order, there was hardly any utility and benefit to the parties except to incur more legal costs if the plaintiffs were to be directed to file the application for leave in the second Scheme Court. Based on these reasons, the court rejected the defendant's contention that the application under encl 33 ought to be dismissed on the ground that it should have been filed before the second Scheme Court granting the second restraining order (see paras 123–124 & 128–129).

(9) Based on the above findings, the court made the following orders: (a) a declaration that the leave of the court was no required for the admiralty writ in rem action against the defendant to be filed, maintained and continued under the first restraining order dated 19 November 2021 and

extended on 19 February 2022; (b) the court granted leave to the plaintiff to file, maintain and continue the admiralty writ in rem action against the defendant under the second restraining order dated 10 January 2023 and extended on 10 April 2023 to 10 October 2023; and (c) the defendant to pay the plaintiff costs fixed at RM7,500 subject to the usual payment of allocator (see para 133).

[Bahasa Malaysia summary

Kes ini membangkitkan isu sama ada moratorium di bawah skim perkiraan adalah terpakai kepada tuntutan *in rem* memandangkan ayat dalam s 368(1) Akta Syarikat 2016 ('AS') merujuk kepada 'menghalang prosiding selanjutnya dalam apa-apa tindakan atau prosiding terhadap syarikat itu kecuali dengan keizinan mahkamah'. Dalam memutuskan isu ini, mahkamah telah mempertimbangkan dua teori, pertama teori 'personifikasi', dan kedua, teori 'prosedur' berhubung penggunaannya terhadap lien maritim. Plaintif adalah pemilik kapal yang dikenali sebagai Edzard Schulte manakala defendan adalah pemilik kapal yang dikenali sebagai Setia Budi. Pertikaian antara pihak-pihak berpunca daripada insiden maritim di mana kapal defendan yang pada ketika itu sedang menunda sebuah kapal penginapan telah menyebabkan kapal penginapan tersebut melanggar kapal plaintif. Plaintif kemudiannya memulakan tindakan *in rem* ('writ in rem') terhadap defendan dan seterusnya memperoleh waran penahanan ke atas kapal defendan tanpa mengetahui bahawa defendan telah pun memfailkan permohonan kepada mahkamah ('Mahkamah Skim pertama') untuk kebenaran mengadakan mesyuarat pemiutang-pemiutang berhubung dengan cadangan skim perkiraan menurut s 366(1) AS. Defendan juga telah memperoleh perintah halangan menurut s 368(1) AS yang berkuat kuasa menghalang dan mengekalkan semua prosiding semasa dan selanjutnya dalam apa-apa tindakan undang-undang atau prosiding terhadap defendan dan/atau aset defendan kecuali dengan keizinan mahkamah ('perintah halangan pertama'). Plaintif hanya mengetahui tentang perintah halangan pertama apabila defendan memfailkan permohonan mereka untuk membatalkan writ *in rem* dan waran penahanan tersebut. Plaintif kemudiannya memfailkan lampiran 33 untuk mendapatkan perintah mahkamah bahawa tindakan plaintif memfailkan writ *in rem* tersebut tidak memerlukan apa-apa keizinan daripada mahkamah di bawah perintah halangan pertama dan sebagai permohonan alternatif, plaintif juga memohon keizinan *nunc pro tunc* untuk memulakan dan mengekalkan tindakan ini dan penahanan tersebut. Memandangkan perintah halangan pertama telah pun tamat apabila lampiran 33 difailkan, defendan telah memperoleh daripada mahkamah ('Mahkamah Skim kedua') perintah halangan yang baharu ('perintah halangan kedua') yang mempunyai terma yang sama dengan perintah halangan pertama. Defendan bergantung pada perintah halangan kedua untuk menentang lampiran 33. Isu-isu yang timbul dalam lampiran 33 adalah seperti berikut: (a) sama ada *writ in rem* plaintif yang timbul daripada tuntutan berdasarkan *lien* maritim tertakluk kepada perintah halangan

pertama dan/atau perintah halangan kedua; (b) jika jawapan kepada (a) adalah afirmatif dan keizinan diperlukan di bawah perintah halangan pertama dan/atau perintah halangan kedua, sama ada mahkamah perlu memberikan keizinan kepada plaintif, sama ada *nunc pro tunc* atau sebaliknya; dan (c) sama ada mahkamah mempunyai bidang kuasa untuk memberikan keizinan tersebut atau adakah permohonan untuk keizinan tersebut sepatutnya difailkan di hadapan Mahkamah Skim pertama atau Mahkamah Skim kedua mengikut mana-mana yang berkenaan.

Diputuskan:

(1) Perkataan 'prosiding lanjutan' dalam 'semua prosiding semasa dan lanjutan' dalam perintah halangan pertama pastinya tidak boleh dianggap sebagai prosiding lanjutan daripada prosiding semasa dan sedia ada seperti yang dicadangkan oleh plaintif atas sebab mudah bahawa apabila prosiding 'semasa' ditangguhkan, tidak mungkin ada 'prosiding lanjutan' daripada 'prosiding semasa'. Oleh itu, perkataan 'prosiding lanjutan' semestinya merujuk kepada 'prosiding masa hadapan' yang berbeza daripada prosiding 'semasa'. Selanjutnya, adalah jelas bahawa rujukan kepada penggulungan dalam perintah halangan pertama adalah merujuk kepada prosiding masa hadapan terhadap syarikat kerana tiada prosiding penggulungan sedia ada yang difailkan terhadap pemohon. Skop perintah halangan pertama juga bertindak mencegah terhadap prosiding yang belum dimulakan. Sehubungan itu, mahkamah menolak hujahan plaintif bahawa writ *in rem* plaintif, satu tindakan yang tidak wujud pada masa perintah halangan pertama tetapi difailkan pada 11 Julai 2021, adalah berada di luar skop perintah halangan pertama (lihat perenggan 47–49).

(2) Mahkamah tidak boleh menerima hujahan plaintif bahawa pemfailan *writ in rem* bukanlah 'prosiding' di bawah s 368(1) AS atau perintah halangan pertama. Mahkamah berpendapat bahawa makna yang jelas dan biasa kepada perkataan 'prosiding' semestinya merangkumi permulaan tindakan undang-undang yang termasuk tindakan yang dimulakan oleh proses undang-undang biasa, sama ada melalui writ saman, saman pemula dan/atau *writ in rem* (lihat perenggan 57 & 59).

(3) Di bawah teori 'personifikasi', mahkamah melihat kapal sebagai entiti jural dan menahan kapal untuk memulakan prosiding *in rem* yang menetapkan liabiliti kapal dan bukannya liabiliti pemilik kapal. Teori 'prosedur' menganggap rampasan kapal sebagai alat untuk memaksa pemilik untuk menjawab dan tindakan tersebut dianggap sebagai tindakan *in personam* terhadap pemilik kapal semasa ia dimulakan. Dalam kes ini, mahkamah berpendapat bahawa tidak seperti tuntutan berdasarkan lien berkanun di mana tindakan *in rem* berdasarkannya hanyalah alat prosedur untuk membolehkan pihak yang menuntut

mewujudkan kepentingan sekuriti untuk tuntutannya, tindakan *in rem* berdasarkan *lien* maritim adalah tuntutan *in rem* 'tulen' dalam erti kata bahawa hak proprietari diletakkan pada kapal pada masa tuntutan tersebut timbul melalui kuatkuasa undang-undang dan tuntutan tersebut ditujukan kepada res dan bukan kepada pemilik kapal. Oleh itu, mahkamah harus mengiktiraf dan menerima pakai teori personifikasi dalam tindakan *in rem* berdasarkan *lien* maritim. Berdasarkan dapatan-dapatan di atas, mahkamah bersetuju dengan plaintif bahawa perintah halangan pertama tidak terpakai bagi tindakan *in rem* yang difailkan oleh plaintif terhadap kapal tersebut, waran penahanan tersebut atau pelaksanaan penahanan tersebut kerana tuntutan plaintif di sini adalah berdasarkan lien maritim, yang merupakan tindakan *in rem* yang tulen (lihat perenggan 73–74, 87, 92 & 95).

(4) Seksyen 368(1) AS hanya merujuk kepada tindakan *in personam* atau prosiding terhadap syarikat. Sehubungan itu, rujukan kepada aset defendan dalam perintah halangan pertama mesti ditafsirkan sebagai prosiding terhadap aset syarikat dalam tindakan *in personam* dan bukan dalam tindakan *in rem*. Selanjutnya, mahkamah tidak bersetuju dengan defendan bahawa perintah halangan pertama meliputi tuntutan berdasarkan lien maritim dan/atau lien berkanun kerana perenggan 3(iv) perintah tersebut merujuk kepada pelaksanaan atau pelaksanaan yang dimaksudkan bagi 'any liens, securities ...'. Ini kerana, lien maritim timbul secara automatik melalui kuatkuasa undang-undang pada masa kejadian yang berkaitan, dalam kes ini, pelanggaran yang berlaku pada 12 Januari 2021. Ia bukanlah berdasarkan apa-apa dokumen sekuriti (lihat perenggan 96–100).

(5) Berdasarkan dapatan-dapatan di atas, mahkamah memutuskan bahawa berkenaan dengan permulaan dan pemfailan *writ in rem*, plaintif tidak memerlukan apa-apa keizinan daripada Mahkamah Skim pertama di bawah perintah halangan pertama. Walau bagaimanapun, keizinan diperlukan sebaik sahaja defendan memilih untuk hadir pada 4 November 2022, jika plaintif ingin meneruskan tindakan *in personam* terhadap defendan. Ini bagaimanapun bukan lagi isu langsung di hadapan mahkamah pada masa pendengaran lampiran 33 memandangkan perintah halangan pertama telah tamat tempoh pada 19 November 2022 (lihat perenggan 101–102 & 107).

(6) Perintah halangan kedua bukanlah 'lanjutan' bagi perintah halangan pertama kerana berdasarkan s 368(2) AS, tempoh maksimum yang boleh diperoleh oleh defendan berkenaan dengan perintah halangan ialah 12 bulan. Oleh itu, perintah halangan kedua sebenarnya adalah perintah halangan yang baharu. Walau apa pun, atas alasan-alasan yang sama yang diberikan di atas, mahkamah memutuskan bahawa perintah halangan kedua juga tidak meliputi tindakan writ *in rem* plaintif terhadap kapal

defendan dan hanya memerlukan plaintif untuk mendapatkan keizinan untuk meneruskan prosiding berkaitan dengan tindakan *in personam* terhadap defendan (lihat perenggan 108–110).

(7) Defendan tidak menunjukkan bahawa pemberian keizinan kepada plaintif untuk meneruskan tindakan writ *in rem* ini akan dengan apa cara sekalipun menghalang kejayaan pelaksanaan skim perkiraan yang dicadangkan. Malah, defendan telah mengakui bahawa kapal defendan sama sekali tidak dilihat memainkan apa-apa peranan penting dalam skim perkiraan yang dicadangkan oleh defendan. Selanjutnya, fakta menunjukkan bahawa defendan jelas telah meninggalkan kapal tersebut. Sebagai pemiutang terjamin dengan kepentingan proprietari, plaintif tidak seharusnya dihalang daripada melaksanakan hak hartanya jika berbuat demikian tidak langsung menghalang percubaan syarikat untuk menstruktur semula. Atas sebab-sebab ini, mahkamah telah memberikan keizinan kepada plaintif di bawah perintah halangan kedua untuk meneruskan prosiding *in personam* dalam tindakan writ *in rem* dan mengekalkan penahanan (lihat perenggan 116–120).

(8) Mahkamah Skim kedua yang mendengar dan meluluskan permohonan bagi cadangan skim perkiraan dan perintah halangan kedua tidak mempunyai bidang kuasa eksklusif untuk mendengar permohonan keizinan. Sesungguhnya, 'Mahkamah' dalam AS ditakrifkan dalam s 2(1) AS bermaksud 'Mahkamah Tinggi atau seorang hakim Mahkamah Tinggi'. Oleh itu, mana-mana Mahkamah Tinggi atau hakim Mahkamah Tinggi boleh mendengar dan membenarkan permohonan keizinan tersebut. Di samping itu, mengambil kira kepastian bahawa Mahkamah Skim kedua tentunya akan memberikan keizinan kepada plaintif untuk meneruskan tindakan writ *in rem* ini berikutan konsesi yang dibuat oleh defendan untuk mengecualikan tindakan ini daripada perintah halangan kedua, hampir tidak ada apa-apa utiliti dan manfaat kepada pihak-pihak kecuali untuk menanggung lebih banyak kos guaman jika plaintif diarahkan untuk memfailkan permohonan keizinan di Mahkamah Skim kedua. Berdasarkan alasan-alasan ini, mahkamah menolak hujahan defendan bahawa permohonan di bawah lampiran 33 sepatutnya ditolak atas alasan bahawa ia sepatutnya difailkan di hadapan Mahkamah Skim kedua yang memberikan perintah halangan kedua (lihat perenggan 123–124 & 128–129).

(9) Berdasarkan dapatan-dapatan di atas, mahkamah membuat perintah-perintah berikut: (a) pengisytiharan bahawa keizinan mahkamah tidak diperlukan untuk memfailkan, mengekalkan dan meneruskan tindakan writ *in rem* admiralti terhadap defendan di bawah perintah halangan pertama bertarikh 19 November 2021 dan dilanjutkan pada 19 Februari 2022; (b) mahkamah memberikan keizinan kepada plaintif untuk memfailkan, mengekalkan dan

meneruskan tindakan writ *in rem* admiralti terhadap defendan di bawah perintah halangan kedua bertarikh 10 Januari 2023 dan dilanjutkan pada 10 April 2023 hingga 10 Oktober 2023; dan (c) defendan membayar kos plaintif yang ditetapkan pada kadar RM7,500 tertakluk kepada bayaran biasa alokator (lihat perenggan 133).]

Cases referred to

Atlantic Computer Systems plc, Re [1991] BCLC 606, CA (refd)
Century Sun International Ltd, Re [2022] HKCU 1890 (refd)
Hur v Samsun Logix Corp [2015] 1009 ACSR 137, FC (refd)
IM Skaugen SE and other matters, Re [2018] SGHC 259, HC (refd)
Kim v Daebo International Shipping Co Ltd [2015] FCA 684, FC (refd)
Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd [1999] 2 SLR(R) 793, CA (refd)
Lehman Brothers Australia Ltd (in liq) (No 2), Re [2013] FCA 965, FC (refd)
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Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd [2019] SGCA 29, CA (refd)
Precious Shipping Public Company Ltd and others v OW Bunker Far East (Singapore) Pte Ltd and others [2015] SGHC 187, HC (refd)
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Sapura Energy Bhd & Ors (WA-24NCC-121–03 of 2023) (unreported), HC (refd)
Stolt Kestrel BV v Sener Petrol Denizcilik Ticaret AS; CDE SA v Sure Wind Marine Ltd [2015] ECWA Civ 1035, CA (refd)
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The Fierbinti; Romline SA Shipping Co v Owners of Cargo Lately Laden on Board the Ship or Vessel 'fierbinti' [1994] 3 SLR 864, CA (refd)
The Hull 308 [1991] 2 SLR(R) 643, CA (folld)
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The 'Ocean Winner' and other matters [2021] SGHC 8, HC (folld)
Top Builders Capital Bhd & Ors, Re [2021] 10 MLJ 327, HC (refd)
Wei Hsing Food (S) Pte Ltd v The Owners or Demise Charterers of The Ship or Vessel 'The Neptune' and another action [2005] 5 MLJ 702, HC (refd)
Yu v STX Pan Ocean Company Ltd (South Korea) [2013] FCA 680, FC (refd)

Legislation referred to

Civil Jurisdiction and Judgments Act 1982 [UK] s 34
Companies Act 2016 ss 2(1), 366(1), 368, 368(1), (2)
Companies Act 1967 [SG] ss 210(10), 211B
Senior Court Act 1981 [UK] s 20(2)(e), (2)(f), (2)(g), (2)(h), (2)(i), (2)(j), (2)(k), (2)(l), (2)(m), (2)(n), (2)(o), (2)(p), (2)(q), (2)(r)
Supreme Court Act 1981 (repealed by Senior Court Act 1981) [UK] s 21(3)

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Ong Chee Kwan J:

INTRODUCTION

[1] Recently the courts have been seeing many companies forced to seek reorganisation and/or other insolvency proceedings as a means to extricate themselves from financial difficulties. Section 366(1) of our Companies Act 2016 provides for the courts to order the debtor company to convene meetings of its creditors with the view of approving a proposed scheme of arrangement and compromise. Almost invariably, the debtor company will also apply for a moratorium on all legal actions and proceedings against it under s 368(1) of the said Act.

[2] This case raises an interesting question as to whether the moratorium under a scheme of arrangement applies to in rem claims as the wordings of s 368(1) refers to 'restrain further proceedings in any action or proceeding *against the company* except by leave of the Court'.

[3] The issue illustrates the tension between the insolvency regimes which generally provide for the courts to have authority over all the assets of the debtor and the primacy of admiralty law over maritime assets, particularly the creditor's right to arrest the vessel as security or to enforce its security. The moratorium preventing the creditor's rights of arrest is of particular concerns to the maritime industry and the nature of maritime law.

[4] The consideration of the question that the in rem action is against the res and not the company requires the examination of the 'personification' theory and the 'procedural' theory treatment of the in rem action and the distinction between maritime liens and statutory liens.

BACKGROUND FACTS

[5] The plaintiffs' claims in this action arise from an allision that occurred on 12 January 2021 at or around 19:32 hours (local time) in the evening at the inner anchorage of the port of Kuantan ('Allision') involving the defendants' vessel 'SETIA BUDI'. As a result, 'EDZARD SCHULTE' sustained loss and damage. At the time of the Allision, 'EDZARD SCHULTE' was stationary and at anchor.

[6] According to the plaintiff, at the material time, the tug 'SETIA BUDI', in conjunction with another tug 'SETIA FAJAR', was towing the accommodation barge 'SETIA STATION 2'.

[7] 'SETIA BUDI' with 'SETIA STATION 2' in tow, then caused 'SETIA STATION 2' to allide into the plaintiffs' vessel 'EDZARD SCHULTE'.

[8] The plaintiffs obtained the Electronic Chart Display and Information Systems ('ECDIS') data of the 'EDZARD SCHULTE', which showed the relative positions, headings, and speed of the various vessels at all material times. ECDIS is a computerised information system used by vessels for nautical navigation.

[9] Based on these data, the eyewitness accounts of the plaintiffs' relevant crew onboard 'EDZARD SCHULTE' at the material time and the analysis of a master mariner nautical expert (who interpreted the Automatic Identification System ('AIS') and ECDIS data), the plaintiffs' case is as follows:

(a) before 1100 hours UTC (ie coordinated universal time), 'SETIA STATION 2' was connected by tow to 'SETIA FAJAR';

(b) at around 1100 hrs UTC, 'SETIA BUDI' arrived next to 'SETIA FAJAR' and a towline from 'SETIA BUDI' was connected to 'SETIA STATION 2'. It appeared 'SETIA FAJAR' also remained connected to 'SETIA STATION 2';

(c) at this time, both 'SETIA BUDI' and 'SETIA FAJAR' were connected by tow to 'SETIA STATION 2';

(d) all three vessels, ie 'SETIA BUDI' and 'SETIA FAJAR' both with 'SETIA STATION 2' in tandem tow then drifted together towards 'EDZARD SCHULTE' in unison;

(e) at 1132 hours UTC, 'SETIA STATION 2' allided with 'EDZARD SCHULTE'; and

(f) after the Allision, 'SETIA FAJAR' was successfully disconnected from 'SETIA STATION 2' and left the area. 'SETIA BUDI' remained connected to 'SETIA STATION 2' thereafter.

[10] The plaintiff claims that based on the empirical evidence, 'SETIA BUDI' (alternatively 'SETIA FAJAR'), was in control of 'SETIA STATION 2' and responsible for the latter's navigation and maneuvering.

[11] Shortly after the Allision occurred, the plaintiffs contacted the defendants regarding their claims. This was followed by without prejudice

discussions and communications where the plaintiffs had requested payment of their claims, but there was no further progress since about February 2022.

[12] On 9 June 2022, the plaintiffs' solicitors wrote to the defendants to demand payment of the plaintiffs' claims or alternatively, security for their claims. The defendants did not respond to this demand at all.

[13] Unbeknown to the plaintiffs, sometime on 21 May 2021, Alam Maritime Resources Bhd ('AMRB') and Alam Maritim (M) Sdn Bhd ('AMSB') who are the owners of 'SETIA BUDI' had filed an originating summons in WA-24NCC-214–05 of 2021 ('OS 214') at the High Court of Kuala Lumpur ('the first Scheme Court') for leave to convene meetings of creditors for the purposes of considering and if thought fit, approving with or without modification, a proposed scheme of arrangement and compromise under s 366(1) of the Companies Act 2016 ('the CA 2016').

[14] Further and significantly, on 19 November 2021, AMRB and AMSB had obtained an extension for the leave to convene the scheme meeting and at the same time obtained from the Scheme Court an order under the aforesaid s 368(1) of the CA 2106 restraining and staying 'all current and further proceedings in any legal actions or proceedings against AMSB and/or assets of AMSB for a period of three months from 19 November 2021 except by leave of the Court' ('the first restraining order').

[15] More specifically, the full terms of the first restraining order stipulate as follows:

> (3) A restraining order pursuant to s 368(1) of the Companies Act 2016, whereby all *current and further proceedings* in any legal actions or proceedings against [AMSB] and/or the assets of [AMSB] (wherever located, and whether held by [AMSB] in whole or in part, directly or indirectly, as principal or agent, beneficially or otherwise), which legal actions or proceedings include but not limited to the following:
>
> (i) Court winding up and arbitration proceedings as well as *any intended or future proceedings*
>
> (ii) Execution or enforcement process, extra-judicial *proceedings or other proceedings*
>
> (iii) Any proceedings in the Industrial Court and/or Labour Court;
>
> (iv) Any proceedings in any tribunal under any statute;
>
> (v) Demands for payment, *exercise or intended exercise of any liens*, *securities*, undertakings and guarantees under any documents, performance bonds, bank guarantees or security documents; and
>
> The dealing with such assets in any way or entering upon any premises upon which such assets may be located except with the prior written consent of

A [AMSB] or upon further order of this Court; be restrained and stayed except by leave of this Court for a period of three (3) months from the date of this Order and subject to such terms as this Court may impose.

B **[16]** The first restraining order which was to expire on 18 February 2022 was extended on 17 February 2022 for a further period of nine month from 19 February 2022 until 18 November 2022. The first restraining order provided for a moratorium of all legal actions and proceedings against AMSB, the owner of the vessel unless leave of the court is obtained.

C **[17]** However, the defendants never notified the plaintiffs of their intended scheme of arrangement in OS 214 and/or the first restraining order even after receiving the aforesaid legal demand on 9 June 2022.

D **[18]** The plaintiffs then commenced the present in rem action against the defendants on 11 July 2022 ('the writ in rem') and proceeded to obtained a warrant of arrest on 12 July 2022. The writ in rem and the warrant of arrest was served on the vessel, 'SETIA BUDI' ('the vessel') on 14 September 2022.

E **[19]** When the bailiff and the plaintiffs' lawyers boarded the vessel, there was no crew onboard. The vessel was completely unmanned, and the court was informed that this continues to be the case. Further, when the bailiff and the plaintiffs' lawyers searched for the vessel's certificates and documents, these could not be found on board and had apparently been removed from the vessel.
F The defendants have refused and/or failed to send any crew onboard the vessel or to provide necessary supplies to the vessel, despite requests from the port authority and the Sheriff. The defendants have refused and/or failed to arrange for the shifting of the vessel from its present location in Kemaman to a safer
G location in port, as requested by the port authority. The defendants have also turned off the AIS of the vessel.

[20] After filing the writ in rem and serving the same on the vessel on 14 September 2022, the defendants did not immediately enter appearance to
H the in rem action. As a result, on 18 October 2022, the plaintiffs filed their application for judgment in default of appearance to be entered against the defendants ('encl 17').

I **[21]** The defendants only entered their appearance on 4 November 2022 and on 15 November 2022, the defendants filed their application to strike out the writ in rem and the warrant of arrest ('encl 24'). It was in the affidavit filed in support of encl 24 that the defendants alluded to the first restraining order and the plaintiffs came to know of the same and the proceedings in OS 214.

[22] As a result, on 15 December 2022 the plaintiffs filed their application seeking an order that the plaintiffs' commencement of the writ in rem in this case did not require any leave from the court under the first restraining order and as an alternative prayer, the plaintiffs also sought for leave *nunc pro tunc* to commence and maintain this action and the arrest ('encl 33').

[23] It is not in dispute that by the time encl 33 was filed, the first restraining order had already expired on 18 November 2022. This is because under s 368(2) of the CA 2016, after an initial restraining order is made (which cannot be more than three months), the court's powers to extend the restraining order cannot exceed more than nine months. In other words, the maximum period that the applicant can obtain in respect of a restraining order under s 368 of the CA 2016 is 12 months.

[24] However, in a recent unreported decision by the High Court in *Sapura Energy Bhd & Ors* (WA-24NCC-121–03 of 2023) (unreported), it was held that there is no prohibition under the CA 2016 for an applicant who had failed to procure the requisite approvals for its scheme of arrangement under an application filed pursuant to s 366(1) of the CA 2016, to file a fresh application for leave to convene creditors' meetings again under the same section to consider the scheme of arrangement and for the court to grant a fresh restraining order under the aforesaid new application. It seems that the High Court had in that case relied on the decisions in *Re Century Sun International Ltd* [2022] HKCU 1890, *Re Sunbird Business Services Ltd* [2020] EWHC 2860 (Ch), *Re Lehman Brothers Australia Ltd (in liq) (No 2)* [2013] FCA 965 and *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] SGCA 29.

[25] In our present case, it would appear that the defendants were not able to convene the requisite creditors' meetings for their proposed scheme of arrangement prior to the expiration of the first restraining order on 19 November 2022 in OS 214.

[26] Consequently, the defendants had filed a new originating summons in WA-24NCC-1079–12 of 2022 before the High Court ('the second Scheme Court') for leave to convene fresh creditors' meetings and a fresh restraining order was obtained on 11 January 2023 ('the second restraining order'). The terms of the second restraining order are similar to the first restraining order. The second restraining order which was initially for three months has been extended for a further six months to 10 October 2023. This is not in dispute.

[27] Learned counsel for the defendants have sought to rely on the second restraining order granted by the second Scheme Court to oppose the plaintiffs' encl 33.

[28] In the meantime, the vessel 'SETIA BUDI' remains under arrest. No alternative security has been proffered.

LEGAL ISSUES

[29] Enclosure 33 raises the following interesting legal issues:

(a) whether the plaintiffs' writ in rem which arises from a claim based on maritime lien is subject to the first restraining order and/or the second restraining order;

(b) if the answer the (a) is in the affirmative and leave is required under the first restraining order and/or the second restraining order, whether the court should grant the plaintiffs leave, be it *nunc pro tunc* or otherwise; and

(c) whether this court is vested with the jurisdiction to grant the leave or that the application for leave ought to be filed before the first Scheme Court or the second Scheme Court as the case may be.

[30] Each of these legal issues shall be taken in turn.

Whether leave is required

[31] Section 368(1) of the CA 2016 provides that:

> If no order has been made or resolution passed for the winding up of a company and a compromise or arrangement has been proposed between the company and its creditors or any class of creditors, the Court may, in addition to any of its powers, on an application in the summary way of the company or any given member or creditor of the company, *restrain further proceedings in any action or proceeding against the company except by leave of the Court* and subject to any terms as the Court may impose (Emphasis added.)

[32] Learned counsel for the plaintiffs contended that the first restraining order does not restrain or 'bar' the plaintiffs from commencing the writ in rem action or maintaining the arrest.

[33] Relying on the strict wordings of the first restraining order, learned counsel for the plaintiffs submitted that the first restraining order only restrains and stays actions *existing* at the time the first restraining order was made on 19 November 2021. The first restraining order ought to be read as confined only to 'all current and further proceedings'. This means *current*, *existing* actions and the words 'further proceedings' in this context, according to learned counsel for the plaintiffs, mean in furtherance of that current and existing actions.

[34] As regards the words 'any intended or future proceedings' in para 3(i) of the first restraining order, it is contended that their meaning is circumscribed by the operative words 'all current and further proceedings'. So, 'any intended or future proceedings' means intended or future steps in such current and existing actions, (if any).

[35] As such, the first restraining order did not restrain nor forbid actions filed *after* 19 November 2021. As the writ in rem was filed on 11 July 2022 and the warrant of arrest obtained on 12 July 2022, neither this action nor the warrant of arrest including the execution of the same on 14 September 2022 was restrained (or stayed) by the first restraining order.

[36] Secondly, as a separate and distinct ground, learned counsel for the plaintiffs contended that the writ in rem is an action in rem against the vessel, 'SETIA BUDI'. The party who is the 'defendant' in this writ in rem, which is an action against the res, is the vessel and not the shipowner which in this case is AMSB being one of the two applicants in the OS 214.

[37] The first restraining order restrains only actions or proceedings against *the company* and this regard, the vessel, 'SETIA BUDI' is separate from the company. This in rem claims against the res in the writ in rem action continues even after the defendants have entered an appearance, the effect of which is that the writ in rem action will continue both as an action in rem and an action in personam. This means that leave, if at all, is only required after the defendants had entered their appearance but not at the time of the commencement of the writ in rem action.

[38] In support, learned counsel placed reliance on the Singapore case of *Kuo Fen Ching v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR(R) 793 ('Kuo Fen Ching') at [24]–[25] which state:

> [24] We were however of the view that S Rajendran J was correct in stating that the in rem action continues to proceed against the *res* even though the real party to the action is the shipowner as was indicated in *The Indian Grace* ([6]). That is how Lord Brandon's otherwise apparently contradictory statements in *The August Eighth* can be interpreted and thus reconciled. Otherwise the whole purpose of the in rem action would be defeated in cases where the defendants turn out to be insolvent or if it proves difficult to enforce the judgment. The ship or the subsequent security provided is the *res* against which the judgment can be enforced in favour of the claimants, even if the defendants to the action in the sense that an inanimate object cannot be a defendant, are the shipowners. The portions of the House of Lords judgment relied on by the appellants were theoretical expositions on the nature of in rem actions and did not constitute the ratio. Moreover, the comments were due to the specific context of the facts in the case.
>
> [25] *We were therefore of the view that the general perception accepted by the local cases that an admiralty action in rem is an action against the res remains intact despite the*

comments by the House of Lords in The Indian Grace. The decision in *J Gadsden Pty Ltd v Australian Coastal Shipping Commission* (1977) 131 FLR 157; [1977] 1 NSWLR 575 makes this clear while at the same time holding that the shipowner is the defendant in an action in rem. It would be preposterous for this court to hold otherwise as this would mean that a perfectly good action in rem would be defeated in this manner as soon as the defendant company was dissolved after having entered an appearance. The admiralty action in rem in the present case therefore could proceed against the Capricon or the security which represented it.

[39] The contention that an action in rem is not an action against the company and is therefore not caught by the moratorium arising from a proposed scheme of arrangement and/or judicial management has found favour by Ang Cheng Hock J in the Singapore High Court case of *The 'Ocean Winner' and other matters'* [2021] SGHC 8 ('The Ocean Winner'). In paras [66] to [69], the learned judge gave his reasons for his conclusion:

> [66] Even if the filing of the writs is the commencement of 'proceedings' within the meaning of s 211B(8)(c) of the CA, the next question is whether such 'proceedings' have been commenced 'against the company', OTPL.
>
> [67] OTPL submits that, although an admiralty in rem claim is procedurally against the res, which is the ship named in the admiralty writ, the 'true defendant' is the demise charterer of the vessels which, in this case, is OTPL. As the demise charterer of the vessels, it is the relevant person who would be liable in personam for the cargo claims brought by PetroChina in the Writs and hence should be regarded as the person against whom the proceeding has been commenced. For this proposition, counsel for OTPL placed reliance on three cases: *The Indian Grace (No 2)* [1998] 1 Lloyd's Rep 1 at 7 and 10; *The Kusu Island* ([38]) at [22]; and *Kuo Fen Ching and another v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR(R) 793 ('Kuo Fen Ching') at [17] and [18] [2021] 4 SLR The 'Ocean Winner' 549.
>
> [68] I am unable to agree with this submission. As explained at [37] above, an action in rem is an action against the res, not the owner or the demise charterer of the vessel. This principle is in fact reiterated in the cases relied on by OTPL: see *The Kusu Island* at [32]; *Kuo Fen Ching* at [25]. As also already explained (at [39] above), the action only transforms into a mixed action in rem and in personam after the shipowner or charterer enters an appearance. It is only after entry of appearance that any judgment sum can be enforced against the shipowner or charterer personally. Where no appearance is entered by the shipowner or charterer, judgment when entered is enforceable only against the res and no more: *The Kusu Island* at [26]; *Kuo Fen Ching* at [17].
>
> [69] Thus, the fact that the bareboat charterer, OTPL, is the so-called 'true defendant' because PetroChina's cargo claims are, in substance, against the bareboat charterer is beside the point. To determine if the Writs are 'proceedings' against OTPL such that the s 211B moratorium applies, the question is whether OTPL would have been personally liable for the in rem actions commenced by the writs at the time when they were issued. If no appearance had been entered, the actions would remain, at all times, actions in rem against the res (ie, the vessels), and OTPL would not be personally liable at all. That being the case, my view is that the filing

of the writs is not the commencement of proceedings 'against the company', OTPL. A

[40] The High Court in Malaysia *Wei Hsing Food (S) Pte Ltd v The Owners or Demise Charterers of The Ship or Vessel 'The Neptune' and another action* [2005] 5 MLJ 702 at [9] ('The Neptune') has followed the Singapore case of *'The Fierbinti'; Romline SA Shipping Co v Owners of Cargo Lately Laden on Board the Ship or Vessel 'fierbinti'* [1994] 3 SLR 864 ('The Fierbinti'), which along with *The Kusu Island* [1989] 2 SLR(R) 267 ('The Kusu Island') and *Kuo Fen Ching*, firmly establishing this principle that an action in rem at the time of filing is an action against the res. B C

[41] *The Neptune* at para [10] stated the nature of an in rem action in this manner:

(a) first, where the in rem writ is served and the owner or charterer of the vessel enters an appearance, the in rem action also becomes an in personam claim against the owner or charterer. The appearance transforms the proceedings into one where there is also an in personam claim, and the owner or charterer who has entered an appearance will become liable in personam on any judgment obtained. This is regardless of whether the owner or charterer provides any security for the plaintiff's claim. D E

But, if the owner or charterer then furnishes proper and sufficient security for the claim, the action further transforms into a 'pure' in personam action against him for all intents and purposes. The arrest procedure, if not already utilised, and other features of the in rem action then become dormant. The action will then proceed like any other in personam claim against the owner or charterer, save that security has been provided for the claim. F

(b) second, where the in rem writ is served on the vessel and the warrant of arrest is executed but there is no appearance by the ship's owner or charterer, the admiralty action remains and will proceed in rem against the res and only against the res as a 'pure' in rem action. The plaintiff is left to proceed in default of appearance, and if he obtains judgment, or if he obtains an order for sale before that, the vessel will be sold to create a fund to satisfy all claims against the vessel in accordance with the rules of priority. In that sense, the action continues as a true action in rem after the arrest of the vessel if no appearance is entered and no security is provided. The owner or charterer will not be liable in personam on any judgment that is obtained; and G H I

(c) third, where the in rem writ is served and the vessel is arrested and the vessel's owner or charterer enters an appearance but does not provide security, this would be a 'mixed' action in rem and in personam. The action is in rem because the vessel is taken as security. The action is also

in personam because, once the owner or charterer in an admiralty action in rem has entered an appearance in such action, he has submitted himself personally to the jurisdiction of the court. Thus, any judgment obtained binds the res, which is the vessel, and it also binds the owner or charterer in personam.

[42] In the present case, no alternative security has been furnished for the arrest of the vessel. Accordingly, even if leave is required, it would be after the defendants entered their appearance on 4 November 2022 when the writ in rem became a mixed action in rem and in personam.

[43] In any event, and as yet a further ground that no leave of the court is needed for the filing and commencement of the writ in rem, learned counsel for the plaintiffs pointed to the fact that it is common ground that the first restraining order has since expired on 19 November 2022. Hence, even assuming that the first restraining order had the effect of restraining the plaintiffs' action and arrest, it is spent. Accordingly, from 20 November 2022 at the latest, if not before, the plaintiffs are at liberty to proceed with the writ in rem and to maintain the arrest.

THE COURT'S DELIBERATIONS

[44] Let me first address on the learned counsel for the plaintiffs' interpretation of the first restraining order.

[45] I must state from the outset that I am unable to agree with learned counsel for the plaintiffs' construction on the scope of the first restraining order. The *raison d'etre* of issuing the restraining order under s 368(1) of the CA 2016 is to give 'breathing space' to the company to devise a restructuring plan that could meet with the approval from the creditors at the scheme meetings free of any distraction arising from any legal actions and proceedings that may threaten the creditors' confidence in the success and viability of the scheme. It is also to provide the company with the necessary time and resources to be devoted to coming up with a scheme that may be acceptable to the creditors (see *Re Top Builders Capital Bhd & Ors* [2021] 10 MLJ 327).

[46] As a matter of common sense and logic, it could not have been the intention of the applicants seeking the first restraining order under s 368(1) of the CA 2016 to merely confine the moratorium to just legal proceedings existing at the time of the application and not to encompass future legal actions as well. Neither would the first Scheme Court limits the restraining order to only 'current actions' unless there are exceptional and good reasons to do so. The court must therefore approach the construction of its restraining order with the aforesaid consideration in mind.

[47] With respect to learned counsel for the plaintiffs, the words 'further proceedings' in 'all current and further proceedings' in the first restraining order surely cannot be taken to mean further proceedings from the *current* and *existing* proceedings as suggested for the simple reason that once the 'current' proceedings are stayed, there could be no 'further proceedings' from the 'current proceedings'. Thus, the words 'further proceedings' must necessarily refer to 'future proceedings' that are distinct from the 'current' proceedings.

[48] Furthermore, the words 'whereby all current and further proceedings in any legal actions or proceedings ... which legal actions or proceedings include but not limited to the following: (i) court winding up and arbitration proceedings as well as any intended or future proceedings' are wide enough to include legal actions and proceedings that would be filed subsequent to the making of the first restraining order. Quite clearly, the reference to the winding up is a reference to future proceedings against the company since there is no existing winding up proceedings filed against the applicants. To my mind, the scope of the first restraining order also acts pre-emptively against proceedings that have yet been commenced.

[49] Accordingly, I respectfully reject the contention by learned counsel for the plaintiffs that the plaintiffs' writ in rem not being an action existing at the time of the first restraining order but filed on 11 July 2021, falls outside the scope of the first restraining order.

[50] Learned counsel for the plaintiffs also belatedly in his supplemental submission relied on the judgment in *The Ocean Winner* where Ang Cheng Hock J held that the filing of the writs in rem in that case, which were meant to create statutory liens on the vessels, cannot be said to be the commencement of 'proceedings' within the meaning of the moratorium provisions of the Singapore's Companies Act Cap 50 2006 Rev ('the Singapore CA'), particularly under s 211(B) which is the enhanced provision to the s 210(10) which are in pari materia with our s 368(1) of the CA 2016 (see *IM Skaugen SE and other matters, Re* [2018] SGHC 259).

[51] In *The Ocean Winner*, on 22 April 2020, the plaintiffs filed four admiralty in rem writs against four ships demised chartered by Ocean Tankers (Pte) Ltd ('OTPL'). These were said to be cargo claims and thus were statutory lien claims.

[52] A few days earlier, on 17 April 2020, OTPL filed and obtained a moratorium under s 211B of the Singapore CA. This was part of its intended debt restructuring arrangement under a proposed scheme of arrangement.

[53] Subsequently the company went into judicial management and the judicial managers of OTPL brought an application to strike out the writs in rem on the basis that they were caught by the moratorium, and even though leave was required before they could be filed, no such leave had been sought from the court.

[54] The issues in that case were thus: (i) whether the filing of the admiralty in rem writs were commencement of 'proceedings' against 'the company', OTPL; and (ii) whether the filing of the writs constituted an 'execution, distress or other legal process' against 'property' of OTPL.

[55] On the first issue, Ang Cheng Hock J held that the filing of the admiralty in rem writs were *not* commencement of 'proceedings'. The filing merely created the security interest (ie statutory lien) for the plaintiffs, and the court's admiralty jurisdiction was not yet invoked. The filing of the admiralty in rem writ merely crystallised the plaintiffs' security interest, and OTPL was not denied any 'breathing space' by the mere filing of the admiralty writs or was in any way hindered in its efforts to devise a scheme of arrangement (see paras [35], [58] and [71] of the judgment).

[56] In reliance on the aforesaid, learned counsel for the plaintiffs contended that the commencement of the writ in rem in this case was not 'proceedings' under our s 368(1) of the CA or under the first restraining order.

[57] With respect, I am unable to accept that the filing of the writ in rem is not 'proceedings' under s 368(1) of our CA 2016 or the first restraining order. To my mind, a plain and/ordinary meaning to the word 'proceedings' must necessarily include the commencement of legal actions which include actions commenced by the ordinary legal process, be it by writ of summons, originating summons and/or writ in rem.

[58] With respect to Ang Cheng Hock J, I do not share his concern that the claimants with a statutory lien may be deprived of the rights to create their security interest if the moratorium applies to their claims. Unlike a maritime lien, a claimant with a statutory lien is not a secured creditor until the writ in rem is filed and issued. If the claimant fails to commence an action in rem before the shipowner files for a scheme of arrangement or judicial management and a moratorium is effective, to my mind, there is no reason why the claimant with the statutory lien ought to be permitted to proceed to commence an in rem writ without leave of court and in the process to acquire the status of a secured creditor when they were not so prior to the moratorium. The claimant's fate in such a case is nothing more than an unfortunate incidence arising from the consequence of the insolvency or scheme of arrangement or judicial management regimes. On my part, I would prefer the decision by the

Singapore Court in *The Hull 308* [1991] 2 SLR(R) 643.

[59] Accordingly, I also reject the contention by learned counsel for the plaintiffs that their writ in rem filed on 11 July 2022 is not a 'proceedings' under s 368(1) of the CA 2016 and/or the first restraining order.

[60] I will now deal with the learned counsel for the plaintiffs' second contention that the writ in rem is an action against the res and not the company. Before I proceed to consider this ground, it is instructive to look at the nature of in rem claims in admiralty law and to appreciate the discussion surrounding the conflict between the 'personification' theory and the 'procedural' theory of an in rem action.

[61] There are two distinctive features or remedies in the maritime regime that are of relevance here, the first is the 'maritime liens' and the other is the statutory maritime action in rem or what is commonly referred to as 'statutory liens' (I will not discuss mortgagee claim as this is not relevant here).

[62] Maritime liens are created by operation of law and they are secret liens and do not require the lien-holders to have possession of the res. They are internationally recognised and are legal rather than contractual in nature. A maritime creditor who holds a maritime lien is entitled to arrest the vessel to which the lien attaches. The vessel is looked upon as the primary source of security for the claims. A maritime creditor can recover its debts from the proceed of the judicial sale of the vessel, regardless of who actually owns the vessel which may be difficult to identify at times.

[63] Maritime liens were developed to provide security and protection to certain class of claimants that the shipping industry deemed as providing fundamental services to the vessel or as victims of maritime tort that required compensation by the offending vessel. This is because of the peripatetic nature of the vessel and the fact that the vessel could keep incurring liabilities to the disadvantage of these class of claimants.

[64] Traditionally, maritime liens have the following features: (1) it is a privileged claim and ranks in priority above all other claims (save for certain statutory claims, costs of arrest and the sheriff's disbursements); (2) it is a secret lien in that it attaches against the vessel from the time the claim occurs and it does not need to be registered to be valid; (3) It is inchoate in the vessel until it is enforced by the commencement of an action in rem and the arrest of the vessel whereupon it relates back to the time when it first attached to the vessel; (4) it travels with the vessel regardless of any change in the ownership and is only discharged upon a judicial sale or under some extinction events (eg

A submission of bond or payment by the owner); (5) it is created by law and does not depend on possession of the vessel nor the consent of the owner; and (6) it extends only to the value of the vessel.

B **[65]** In Malaysia, like in many common law jurisdictions, the recognised maritime claims that give rise to maritime liens are salvage, damage done by the ship, seaman's and master's wages, bottomry, and master's disbursements (see s 21(3) of the UK Supreme Court Act 1981, now Senior Court Act 1981).

C **[66]** Apart from the narrow category of claims that give rise to maritime liens above, the other category of maritime claims is what is known as statutory right of action in rem or 'statutory liens'. These include claims for los or damage to goods carried on board the vessel, breach of charterparty, claims for goods supplied to the vessel and others as provided under s 20(2)(e) to (r) of the UK
D Senior Court Act 1981.

[67] Professor William Tetley in his book *International Maritime And Admiralty Law* (2002) at p 482 described the statutory right in rem as follows:

> E A statutory right in rem, unlike traditional maritime lien, arises only from the time of arrest of the ship (or, in the United Kingdom, from the time of the issue of the writ of arrest), rather than from the time services are rendered to the vessel or the damages done by it. The statutory right in rem does not travel with the ship, as does the traditional maritime lien, and is expunged by the sale of the vessel. Furthermore, the statutory right in rem ranks after the ship mortgage, whereas the traditional
> F maritime lien ranks before the 'mortgage lien'. Rather than being a substantive property right in the ship emanating from the general maritime law, *the statutory right in rem is purely procedural remedy conferred by statue allowing for arrest of the vessel in an action in rem as security for a maritime law*.

G **[68]** Although a statutory right in rem resembles the maritime lien in that it involves proceeding against the res as distinct from the person ie the action is in rem and not in personam, it differs in the following respects: (1) the nature of the statutory right in rem is purely a procedural remedy and not a substantive
H remedy. They are rights granted by statue to arrest a vessel in an action in rem to obtain a security for the maritime claim that is in essence in personam in nature. It is a procedural device to force the owner of the vessel to appear and to submit to the jurisdiction of the court; (2) statutory rights in rem do not arise with the claim but arise with the issue of the writ in rem and will be
I extinguished with the provision of suitable security and the vessel released; (3) they do not travel with the ship in the sense that if the ship is sold before to the writ in rem is issued, the statutory right in rem is extinguished. Hence, they are secured claims only *after* the writ in rem is issued prior to the change of ownership; and (4) in the case of distribution of the proceeds of the vessel in a

judicial sale, the statutory right in rem ranks after the ship mortgage and much lower than maritime liens.

[69] Significantly for our present purpose, a claim based on maritime liens can be brought against the vessel irrespective of her present ownership and irrespective of any link to liability in personam on the part of the shipowner at the time the claim is brought. On the other hand, all statutory right in rem claims need to have a link with liability in personam on the part of the owner of the ship to initiate the in rem action. More specifically, one must show that that the person liable in personam on the claim was, at the time the action arose, the owner or charterer or in possession or control of the vessel in connection with which the claim arose and is the beneficial owner of all the shares in the vessel against which the action is brought (see *Nigel Meeson & John Kimbell, Admiralty Jurisdiction And Practice* (4th Ed)).

[70] The aforesaid distinction is of relevance in considering the 'personification' theory and the 'procedural' theory in relation to the in rem action, the subject that I will now come to.

[71] A person who has a claim that lies within the admiralty jurisdiction may commence an action either in rem or in personam or both. In the case of an action in personam, it is based on the personal liability of the defendant such that the judgment obtained can be enforced against the whole of the defendant's property.

[72] Alternatively, the claimant may commence an action in rem, which is an action directly against the res, typically the vessel against which the claim relates. In an action in rem, the vessel itself is the defendant and not the shipowner. When a judgment is obtained, it is against the vessel and the enforcement is limited to the value of the vessel. This is based on the fiction of 'personification', that is, the vessel is deemed to have a separate and distinct legal personality from the shipowner.

[73] However, recent decisions have favoured the theory that an in rem action is 'simply a device for forcing the appearance of the shipowner in personam rather than truly as an action against the ship itself'. Based on this 'procedural' theory, the arrest of the vessel is to force the shipowner to step into court to provide security for the claim.

[74] In other words, under the personification theory, the court views the vessel as a jural entity and arrests the vessel to start an in rem proceeding that fixes the liability of the vessel rather than the liability of the shipowner. The procedural theory treats the seizure of the vessel as a device to coerce the owner

to answer and *the action is deemed as an in personam action against the shipowner at the time of commencement.*

[75] The leading case often cited in support of the procedural theory is the House of Lords decision in *Republic of India and another v India Steamship Co Ltd* [1998] 1 Lloyd's Rep 1 ('The Indian Grace'). The case was concerned with damage to cargo carried on board the vessel, 'The Indian Grace' ie a claim based on a statutory lien. An in personam action was taken out against the defendants in India. Judgment was then entered against the defendants in India. Subsequently, an action in rem was brought in England. The defendants sought to strike out the proceedings on the ground that the action in England was barred by res judicata under s 34 of the UK Civil Jurisdiction and Judgments Act 1982. The House of Lords ordered the in rem proceedings in England to be struck out on the rationale that it was unjust to permit the same issue to be litigated afresh between the same parties. This was notwithstanding that historically, even though an action in personam and an action in rem may involve the same cause of action, they have been regarded as being between different parties. The House of Lords held that it would be wrong to permit the action in rem to proceed.

[76] The House of Lords stated that the procedural theory of admiralty actions prevailed and revealed that in substance, the owners of the vessels were the parties to an action in rem and eschewed the mystique of the personification theory which had previously regarded the vessel as the 'wrongdoer'.

[77] Significantly, the Law Lords chose not to comment on maritime liens which seemed to accrue independently of personal liability of the shipowner as the facts of the case in *The Indian Grace* did not concern this subject.

[78] However, the 'procedural' theory opined in *The Indian Grace* has not been followed by the courts in Australia and Singapore. In *Yu v STX Pan Ocean Company Ltd (South Korea)* [2013] FCA 680 ('STX Pan Ocean'), Buchanan J held that a stay of proceeding under article 20(1) of the Modal Law should not preclude a claimant from bring a subsequent in rem action to enforce a maritime lien. The court applied the personification theory and treated the vessel as the defendant which is different from the debtor company. This decision has been followed in subsequent cases in Australia (see *Kim v Daebo International Shipping Co Ltd* [2015] FCA 684 and *Hur v Samsun Logix Corp* [2015] 1009 ACSR 137).

[79] Similarly, in *Kuo Fen Ching*, the Singapore Court of Appeal had to examine the issue whether a judgment in rem can be entered notwithstanding the vessel owner's dissolution. On the nature of an action in rem, the Court of

Appeal, following *The Kusu Island*, held that the action is against the vessel even though upon the owner entering appearance, the action also continues as an action in personam. Both the action in rem and the action in personam run parallel but remained separate and distinct. *The Indian Grace* was distinguished on the ground that the decision to strike out the proceedings in England was based on the doctrine of res judicata and s 34 of the UK Civil Jurisdiction and Judgments Act 1982.

[80] A similar position was again taken by the Singapore High Court in *Precious Shipping Public Company Ltd and others v OW Bunker Far East (Singapore) Pte Ltd and others* [2015] SGHC 187 ('Precious Shipping') where in dismissing the shipowner's interpleader application, the learned judge, Steven Chong J (now JCA) opined that the in personam action against the shipowner and the in rem action against the vessels were of a different nature and did not concern the same debt.

[81] Having set out the aforesaid, I now turn to the contention by learned counsel for the plaintiffs that the first restraining order does not preclude the filing of the writ in rem by the plaintiffs in this case as the cause of action is based on the plaintiffs' maritime lien and the defendant is the vessel and not the shipowner. This submission is of course premised upon the personification theory of an in rem action and the decision in *The Ocean Winner*.

[82] Should our courts follow the procedural theory as espoused in *The Indian Grace* or the personification theory in *The Ocean Winner*?

[83] At the outset, it must be noted that in the present case, the claims by the plaintiffs is premised upon a maritime lien arising out of the allision that occurred on 12 January 2021. In *The Indian Grace*, the House of Lords was dealing with a claim giving rise to a statutory right in rem where there is a link to the in personam liability of the shipowner.

[84] Unlike the statutory right in rem claims, a maritime lien claimant is a secured creditor. The plaintiffs' claim, if established, is secured from the moment the damage is done to the vessel. It arises automatically by operation of law and it gives an inchoate substantive property right in the vessel that caused the damage to the plaintiffs. Learned counsel for the plaintiffs stressed on their secured status in urging this court to accept the personification theory for maritime liens.

[85] Neither s 368(1) of the CA 2016 nor the first restraining order makes a distinction between secured and unsecured creditors and the moratorium would apply to both categories of creditors. Indeed, in the case of *Re Panglobal Berhad* [1999] 1 MLJ 590, the High Court granted a restraining order against

A a secured creditor from enforcing its rights under a debenture. This means that s 368(1) of the CA empowers the High Court to restrain even secured creditors' rights to enforce their securities.

B **[86]** However, whether the claims are by unsecured or secured creditors, under s 368(1) of the CA 2016, the court's powers '... to restrain further proceedings in any action or proceeding ...' are in respect of action or proceeding against 'the company' that is proposing the scheme of arrangement.

C **[87]** An action in rem based on a maritime lien is an action against the vessel and not the company, if the personification theory is to be accepted. In this regard, it is my judgment that unlike a claim based on a statutory lien where an in rem action based thereon is merely a procedural device to enable the claimant to create a security interest for its claim, an in rem action based on a D maritime lien is a 'pure' in rem claim in the sense that a proprietary right is attached to the vessel at the time when the claim arises by operation of law and the claim is directed against the res and not the shipowner.

E **[88]** To my mind there are good many reasons to adopt the personification theory to the claims based on the traditional maritime liens which are recognised as secured creditors. The traditional categories of maritime liens are widely recognised and are absolutely essential to the shipping industries. A stay of the rights of the claimant to enforce his maritime lien would put those rights at risks as the vessel may leave the jurisdiction by the time an application for F leave to commence the in rem action is obtained. There is a further risk that the claim maybe time bar if the vessel leaves the jurisdiction by the time leave is granted. The stay moratorium which prevents the maritime lien claimant from enforcing on its rights also means that the vessel may continue to accumulate new maritime liens, to the prejudice of the earlier claimant. As a general rule, G the last lien in time has the highest priorities.

[89] Further, a moratorium would result in delay and the incurring of unnecessary expenses in the enforcement of the maritime lien in the in rem H action. An application to the court for leave to be exempted from the moratorium requires time and costs. The fact that the court would almost always grant leave begs the question why leave is needed in the first place. Any delay in the enforcement of the in rem action will only risk the value of the vessel deteriorating and/or an increase in maintenance costs pending judicial I sale. The shipping industry relies on a speedy judicial sale to preserve the value of the vessel and to minimise expenses. Finally, placing the maritime lien rights at risk and/or causing delay in the sale of the vessel also affect the finance system for vessels.

[90] There is also the risk that the inability to arrest the vessel to enforce the maritime lien by reason of the moratorium may result in the vessel sailing to other jurisdictions which do not recognise the moratorium and allowing the vessel to be arrested and sold through a judicial sale without notice to the claimant. Such a judicial sale will extinguish the claimant's maritime lien.

[91] The effect of excluding the maritime lien in rem action from the moratorium would also have minimal impact on the creditors to the proposed scheme of arrangements as the maritime lien makes the claimant in the in rem action a secured creditor only up to the value of the vessel. If the proceeds from the sale of the vessel is insufficient to meet the claim, the claimant stands only as an unsecured creditor for the balance sum against the shipowner in the event that the shipowner enter an appearance in the in rem action.

[92] Accordingly, given that the maritime liens do not depend on any liability in personam of the shipowner and is a pure in rem action, it is my judgment that our court should recognise and adopt the personification theory in an in rem action that is based on maritime liens and to hold that the defendant in such action is in fact the res and not the shipowner.

[93] In fact, the Lord Steyn's decision in *The Indian Grace* has been interpreted by the English Court of Appeal in *Stolt Kestrel BV v Sener Petrol Denizcilik Ticaret AS; CDE SA v Sure Wind Marine Ltd* [2015] ECWA Civ 1035 as limited to s 34 of the Civil Jurisdiction and Judgment Act and not extending to claims based on maritime liens and that '[T]he court was not concerned with the character of an action in rem at its inception when the writ, now claim form, is issued'. More specifically, Lord Justice Tomlinson at paras 66–68 said as follows:

> 66. The relevant ratio of this decision is, in my respectful view, very limited. It is to be found in Lord Steyn's speech at p 913C to the following effect:
>
> > It is now possible to say that *for the purposes of s 34* an action in rem is an action against the owners from the moment that the Admiralty Court is seised with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or, where a writ is deemed to be served, as a result of the acknowledgment of the issue of the writ by the defendant before service: *The Banco* [1971] P 137. From that moment the owners are parties to the proceedings in rem. (Emphasis added.)
>
> 67. The decision should, in my view, be regarded as one on the proper interpretation of s 34 of the CJJA. It is true that at p 911 Lord Steyn said that the view of Hobhouse J in *The Nordglimt* that at the date of its commencement an action in rem was not between the same parties as an in action in personam 'was always a very narrow view, and that given the decision of the European Court of Justice in *The Maciej Rataj* ('The Tatry') the decision in *The Nordglimt* is no longer good law' and that 'his [Hobhouse J's] analysis can no longer be supported'. However I would make two

points in that regard. Firstly, the European Court of Justice in *The Tatry* [1999] QB 515 was concerned with the proper interpretation of Article 21 of the Brussels Convention. The question posed of the court and its answer are set out as follows at pp 535/6, paras 46–48:

> 46. The national court's second question is whether a subsequent action has the same cause of action and the same object and is between the same parties as a previous action where the first action, brought by the owner of a ship before a court of a contracting state, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a court of another contracting state by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other contracting state.
>
> 47. In article 21 of the Convention, the terms 'same cause of action' and 'between the same parties' have an independent meaning: see Gubisch Maschinenfabrik *KG v Palumbo (Case 144/86)* [1987] ECR 4861, 4874, para 11. They must therefore be interpreted independently of the specific features of the law in force in each contracting state. It follows that the distinction drawn by the law of a contracting state between an action in personam and an action in rem is not material for the interpretation of article 21.
>
> 48. Consequently, the answer to the second question is that a subsequent action does not cease to have the same cause of action and the same object and to be between the same parties as a previous action where the latter, brought by the owner of a ship before a court of a contracting state, is an action in personam for a declaration that that owner is not liable for alleged damage to cargo transported by his ship, whereas the subsequent action has been brought by the owner of the cargo before a court of another contracting state by way of an action in rem concerning an arrested ship, and has subsequently continued both in rem and in personam, or solely in personam, according to the distinctions drawn by the national law of that other contracting state.

The court was thus concerned with the status of an action in rem when it was continuing, following entry of appearance by the owner of the arrested vessel, as both an action in rem and an action in personam. The court was not concerned with the character of an action in rem at its inception when the writ, now claim form, is issued. Second, both The Tatry and The Indian Grace, as was The Deichland, were concerned with claims for loss of or damage to cargo carried by a ship. Such a claim does not give rise to a maritime lien, and the Admiralty jurisdiction in rem is only available in respect of vessels owned or demise chartered at the date of issue of the claim form by the person who would be liable on the action if brought in personam. It is easier in such a case to assimilate an action brought in rem to an action brought in personam against a person who is necessarily the owner or demise charterer of the vessel at the date of issue of the claim form, because that person would be expected to acknowledge service of a writ in rem and enter a personal appearance in order to defend the claim. This reasoning underpins the decisions in The Deichland and The Indian Grace. Collision damage however attracts a maritime lien, as graphically illustrated by the circumstance that the current action in rem was properly brought against the vessel notwithstanding her change of ownership between the date of

collision and the date of issue of the claim form. I note that at p 908 of his speech in *The Indian Grace* Lord Steyn said:

> ...This case is not concerned with maritime liens. That is a separate and complex subject which I put to one side.

With all appropriate deference therefore I would respectfully suggest that it is not easy to reconcile Lord Steyn's eschewing of consideration of the special nature of a maritime lien with his assertion that the traditional analysis of the nature of an admiralty action in rem as expounded by Hobhouse J in *The Nordglimt* can no longer be regarded as good law. Lord Steyn's reasoning simply does not address a case such as the present.

68. Lord Steyn's speech has been subjected to powerful extra-judicial criticism by Nigel Teare QC, now as Teare J the current admiralty judge — see [1998] LMCLQ 33. He suggests, as I have done above, that the decision should be regarded as one only on the ambit of s 34 of the CJJA 1982, whilst acknowledging the apparent width of the manner in which Lord Steyn expressed himself.

[94] The aforesaid seems to suggest that even in an in rem action based on statutory lien (which was the basis of the claim in *The Indian Grace*), Tomlinson J was of the view that the procedural theory does not treat the in rem action as an in personam action at the time of its commencement. This is a point that I do not need to determine in this case.

[95] Suffice it for me to state that I am in agreement with learned counsel for the plaintiffs that the first restraining order does not apply to the in rem action filed by the plaintiffs against the vessel on 11 July 2022, the warrant of arrest that was issued on 12 July 2022 or the execution of the arrest on 14 September 2022 as the plaintiffs' claim here is based on maritime lien, which is a pure in rem action.

[96] Learned counsel for the defendants referred me to the terms of the first restraining order, in particular, to the words '... the assets of [AMSB] ...' and contended that the moratorium in fact extends to not only proceedings against AMSB who is the shipowner but included proceedings against its assets which, it is contended would include the vessel, 'SETIA BUDI'. In other words, the moratorium under the first restraining order covers in rem action as well, regardless of whether the basis of the claims is maritime lien or statutory lien.

[97] With respect, I do not agree.

[98] The court's powers to restrain proceedings under s 368(1) of the CA expressly refers to '... further proceedings in any action or proceeding against *the company* except by leave of the Court ...'. Thus, the provision refers only to in personam action or proceedings against the company. Accordingly, the reference to '... assets of [AMSB] ...' in the first restraining order must be

A construed to mean proceedings against the assets of company in an in personam action.

[99] Reference was also made to para 3 sub-para (iv) of the first restraining order which refers to the exercise or intended exercise of 'any liens, securities ...' to suggest that the first restraining order covers a claim based on maritime lien and/or statutory lien.

[100] Again, with respect, I do not agree. Sub-paragraph (iv) applies only to liens, securities, undertakings and guarantees '... under any documents, performance bonds, bank guarantee or security documents'. As I have alluded to above, maritime lien arises automatically by operation of law at the time of the relevant event, in this case, the allision which occurred on 12 January 2021. It is not based on any security documents.

[101] Accordingly, for the reasons above, it is my judgment that in respect of the commencement and filing of the writ in rem, the plaintiffs did not require any leave from the first Scheme Court under the first restraining order.

[102] However, although the commencement and the filing of the writ in rem in this case did not require prior leave from the first Scheme Court under the first restraining order, leave is required once the defendants chose to enter an appearance on 4 November 2022, if the plaintiffs desire to proceed with the in personam action against the defendants.

[103] This is because by the shipowner entering an appearance, the in rem action whilst continues to be so also assumes the character of an in personam action. This is trite and eloquently explained by LP Then JA in *The Fierbinti* following the principles in *The Kusu Island* which was also followed by our court in *The Neptune*. At para [12] of the judgment LP Thean JA stated that:

> ... An action in rem once commenced against the ship is an action against the ship itself and continues as such even though it may also be an action in personam against the owner thereof. If the owner does not enter an appearance and the judgment is obtained, the judgment is enforceable only against the ship and to the extent of the value of the ship. If, however, the owner enters an appearance the action will continue as an action in rem against the ship and an action in personam against the owner, and if judgment is obtained it is enforceable against the ship and also against the owner to the full extent of the judgment.

[104] In fact, the in rem action and the in personam action that arises after the shipowner entered appearance are both distinct and separate actions (see *Precious Shipping*). Thus, it is my judgment that after the shipowner chose to enter an appearance in the writ in rem action on 4 November 2022, if the plaintiffs intend to proceed with the in personam action against the shipowner,

the plaintiffs will have to seek leave of the court under the first restraining order or the second restraining order (the reason of which will be explained below). If no leave is applied for or granted, the present in rem action shall and can continue to proceed against the vessel, 'SETIA BUDI' only.

[105] In the present case, as alluded to above, the plaintiffs were only made aware of the existence of the first restraining order sometime on 15 November 2022 after being served with the defendants' application under encl 24 to strike out the writ in rem and to set aside the warrant of arrest.

[106] However, by 19 November 2022, the first restraining order has expired.

[107] Hence, even if leave is required under the first restraining order to proceed with the in personam action after the appearance was entered on 4 November 2022 by the defendants, I agree with the contention by learned counsel for the plaintiffs that this is no longer a live issue before this court at the time of the hearing of encl 33 given that the first restraining order had expired on 19 November 2022. In other words, the moratorium under the first restraining order is spent.

[108] Learned counsel for the defendants has referred to the second restraining order as an 'extension' of the first restraining order. This is not strictly correct. Under s 368(2) of the CA 2016, the maximum period or duration that the defendants could obtain in respect of a restraining order in respect of their proposed scheme of arrangement under OS 214 was 12 months. There was to be no further extension after that.

[109] The second restraining order is in fact a new and fresh restraining order obtained from the High Court ('the second Scheme Court') based on a new Originating Summons No WA-24NCC-1079–12 of 2022 ('OS 1079') filed for leave to convene creditors meetings in respect of a revised scheme of arrangement from the one in which the first restraining order was granted. They are not the same albeit worded in similar fashion.

[110] In any case, for the same reasons cited above, it is my judgment that the second restraining order also does not cover the plaintiff's current writ in rem action against the vessel, 'SETIA BUDI' and would only require the plaintiff to seek leave to continue with the proceedings in respect of the in personam action against the defendants.

[111] In this connection, the plaintiffs' application in encl 33 also seeks as an alternative prayer for leave *nunc pro tunc* to commence and maintain this writ in rem action and to maintain the arrest. Enclosure 33 was filed on 15 December 2022.

[112] As stated above, at the time when encl 33 was filed, the first restraining order was already spent. However, by the time encl 33 came up for hearing before this court, the defendants have obtained the second restraining order in OS 1079 on 10 January 2023 which has since been extended to 10 October 2023 by the second Scheme Court. The defendants have referred to and indeed relied on the second restraining order in support of their position that the current writ in rem action ought to be dismissed or stayed on the ground that leave has not been obtained under the second restraining order.

[113] Thus, given my opinion that no leave was required for the plaintiffs to commence the current writ in rem action filed on 10 July 2022 and to issue the warrant to arrest on 11 July 2022 and execute the same on 14 September 2022 (which would apply also for the second restraining order), there is no need for this court to consider the granting of leave *nunc pro tunc* at all. Instead, because the first restraining order is now spent, this court should treat the alternative prayer in encl 33 as an application for leave under the second restraining order as both counsel have proceeded on this basis with learned counsel for the defendants referring to the second restraining order and learned counsel for the plaintiffs proceeding to seek leave to continue with the present writ in rem action under the second restraining order now that the defendants have entered appearance on 4 November 2022.

[114] The aforesaid takes us to the case of *Re Top Builders Capital Bhd & Ors* [2021] 10 MLJ 327 at [101] where I had the opportunity to consider and to opine on the circumstances when the court will likely grant leave under the restraining order made pursuant to s 368(1) of the CA. More specifically, at para [101] of the judgment, I had stated thus:

> Leave will likely be granted where the commencement or continuation of the legal proceedings does not impede the achievement of the scheme or where it would in fact facilitate and/or assist towards the achievement of the scheme. For instance, where the claim is proprietary in nature and the applicant is not seeking anything other than to reclaim possession or ownership of property said to belong to him, leave will normally be granted.

[115] In this particular case, the plaintiffs are a secured creditor and have proprietary rights over the vessel 'SETIA BUDI' in the form of a maritime lien which ranks extremely high in the ladder of priorities over the proceeds from a judicial sale of the same since no alternative form of security has been proffered. The only other claims that could rank higher would be the statutory claims, costs of arrest and the sheriff's disbursements.

[116] The defendants have not demonstrated that the granting of leave to the plaintiffs to continue with the present writ in rem action would in any way impede the successful implementation of the proposed scheme of arrangement

in OS 1079. Indeed, any sums realised from the judicial sale of the vessel 'SETIA BUDI' will not be used by the defendants as working capital or to pay outstanding debts given that the defendants' own estimation of the value realised from the sale of the vessel and earning management fees from the vessel is only RM 288,000 which is significantly less than the sum claimed. The outstanding sum, if any, in the event the plaintiffs succeed in their claim would be treated as unsecured debt against the defendants' total debts.

[117] As a secured creditor with a proprietary interest, the plaintiffs should not be prevented from exercising its property rights if doing so is unlikely to impede the company's attempts to restructure (see *Re Atlantic Computer Systems plc* [1991] BCLC 606).

[118] In fact, at para 109 of Azmi's affidavit affirmed on 23 November 2023 made in support of the defendants' application for the second restraining order in OS 1079 before the second Scheme Court, the defendants have confirmed that they have no objections to excluding the plaintiffs' current writ in rem action from any restraining order that might be granted. In other words, by the defendants' own acknowledgment, the vessel 'SETIA BUDI' does not appear to play any significant part in the defendants' proposed scheme of arrangement at all in OS 1079.

[119] Indeed, the facts suggest that the defendants have clearly abandoned the vessel. On 14 September 2022 when the bailiff and the plaintiffs' lawyers boarded the vessel, there was no crew onboard. The vessel was completely unmanned. Further, when the bailiff and the plaintiffs' lawyers searched for the vessel's certificates and documents, these could not be found on board and had apparently been removed from the vessel. The plaintiffs claimed and the defendants have not disputed that they have refused and/or failed to send any crew onboard the vessel or to provide necessary supplies to the vessel, despite requests from the port authority and the Sheriff.

[120] Accordingly, for the reasons above, I have no hesitation that leave ought to be granted to the plaintiffs under the second restraining order to continue with the in personam proceedings in the writ in rem action and to maintain the arrest.

[121] Finally, learned counsel for the defendants contended that even if leave were to be granted, the application for the same ought to be filed before the second Scheme Court granting the second restraining order which is the court considering the defendants' proposed scheme of arrangement and not this court.

[122] As a general rule, I would agree that the application for leave to commence and/or continue proceedings under the second restraining order ought to be made before the same court that is hearing the application for the proposed scheme of arrangement under s 366(1) of the CA 2016 which in this case would be the second Scheme Court that granted the second restraining order under s 368(1) of the CA 2016. This is because the second Scheme Court which granted the restraining order would ordinarily be better place to appreciate the proposed scheme of arrangement and to determine how the success or the implementation of the same would be prejudiced, if at all, by the particular legal actions or proceedings for which leave are sought to commence or continue.

[123] However just as the High Court hearing admiralty matters does not have exclusive jurisdiction to hear all maritime and admiralty matters, similarly the second Scheme Court that hears and grants the application for the proposed scheme of arrangement and second restraining order also does not have exclusive jurisdiction to hear the application for leave.

[124] Indeed, the 'court' in the CA 2016 is defined in s 2(1) of the CA 2016 to mean 'the High Court or a judge of the High Court'. Thus, any High Court or a judge of the High Court may hear and grant the leave application.

[125] There may be exceptional circumstances where it may be more expedient and perhaps even preferable that the application for leave to be excluded from a moratorium order is to be made before the court that is hearing the existing action instead of the application being made before the Scheme Court. For instance, where the putative legal action or proceeding involves areas of law where the specialised knowledge and experience of a specialist court would be better brought to bear to appreciate the unique and nuanced legal issues arising in the application or where it would simply be a case where it would be more expedient in terms of cost and time for the application for leave to be determined by the judge hearing the putative legal action or proceedings.

[126] In our present case, the defendants have already deposed that they have no objections to excluding the plaintiffs' current writ in rem action from any restraining order that might be granted when it applied for the second restraining order in OS 1079 before the second Scheme Court. This means that the advantage of the second Scheme Court to evaluate the proposed scheme of arrangement and to balance the interests of the creditors subject to the proposed scheme of arrangement with the interest of the plaintiffs seeking leave to commence or continue proceedings against the company is not brought into play at all.

[127] Further, given that this an in rem action involving an arrest of a vessel with no alternative security being offered, it is necessary that the proceedings be dealt with expeditiously to minimise the costs of maintaining the vessel and the value of the vessel from deteriorating. An application for leave, if the same were to be made before the second Scheme Court granting the second restraining order may be protracted due to various other applications seeking to be heard as a matter of urgency, for example application determining the proper classes of creditors and various applications by interveners.

[128] Also, given the certainty that the second Scheme Court administering the proposed scheme of arrangement would invariably grant leave to the plaintiffs to continue with the current writ in rem action owing to the concession made by the defendants to exclude this action from the second restraining order, there is hardly any utility and benefit to the parties except to incur more legal costs if the plaintiffs were to be directed to file the application for leave that is now before this court in the second Scheme Court.

[129] For the aforesaid reasons, with respect to learned counsel for the defendants, I would reject the objection that the application under encl 33 ought to be dismissed on the ground that it should have been filed before the second Scheme Court granting the second restraining order in OS 1079.

[130] Before I conclude, I must make it clear that this judgment deals only with the application of the personification theory where the maritime claim is one that gives rise to a maritime lien. It does not mean that this court will also apply the same personification theory in the case where the maritime claim is based on a statutory lien. Given the facts of this case, there is no need for this court to arrive at a decision on this although I hasten to add by way of *obiter* that my preliminary view is that the procedural theory would probably hold sway in the case involving statutory liens and the argument that the in rem action in such case ought to be treated as an action in personam against the shipowner would probably prevail. The filing of such in rem action would be covered by the moratorium and leave of the court will have to be obtained before proceeding with the same. To exclude the writ in rem based on statutory liens from the moratorium will mean that the claimants would be in a position to change their status from an unsecured creditor to that of secured creditor after the filing of insolvency proceedings including a scheme of arrangement. This would be against the objective of the insolvency and/or scheme of arrangement regimes of ensuring fair play amongst the creditors.

[131] The procedural device theory in relation to a claim based on statutory lien was in fact adopted by Vincent J in *The Neptune* where at paras [11] and [12], the learned judge stated as follows:

A [11] But where the shipowner, potentially liable on the claim, enters appearance to defend the claim, any judgment subsequently obtained is not limited to the value of the vessel but is available for execution against the owner's other assets as well. As explained in *The 'Nordglimt'* [1987] 2 Lloyds LR 470, when an admiralty writ in rem is served on the vessel, 'the relevant person' being the shipowner or the charterer under a charter by demise has a choice whether to defend the action or not. Only if he chooses to defend and enter appearance does the action in rem assumes the in personam character of a normal civil suit. The reason, in my opinion, is as simple as it is obvious: in an admiralty action, where the duration of a moving ship's or vessel's port-calls are as brief and transient as a moving target, it is more practical and realistic to compel its owner, demise charterer or any person having an interest in the ship or vessel to appear from the woodworks rather than to require the claimant to search for him in the woods, where a change of ownership, etc, may have meanwhile occurred in a flash.

[12] *Despite the conceptual difference between the two types of action — action in rem and action in personam — it has been accepted that an action in rem against the ship is in reality a procedural device, a son of legal fiction to assert a maritime claim against the 'relevant person' who was the owner, or a charterer under a charter by demise, of the vessel when the cause of action arose, and remained the owner at the time when the plaintiff's writ was issued*(*The 'Nordglimt'* [1987] 2 Lloyds LR 470.)

[132] Having said that, this point will require fuller submissions when the right opportunity arises for a conclusive determination on the position by our courts.

CONCLUSION

[133] In the premises, in respect of encl 33, this court makes the following orders:

(a) a declaration that the leave of the court is not required for this admiralty writ in rem action against the defendants to be filed, maintained and continued under the restraining orders dated 19 November 2021 and extended on 19 February 2022 obtained by the defendants via Originating Summons No WA-24NCC-214–05 of 2021;

(b) this court grants leave to the plaintiffs to file, maintain and continue this admiralty writ in rem action against the defendants under the restraining orders dated 10 January 2023 and extended on 10 April 2023 to 10 October 2023 obtained by the defendants via Originating Summons No WA-24NCC-1079–12 of 2022; and

(c) the defendants to pay the plaintiffs costs fixed at RM7,500 subject to the usual payment of allocator.

Order accordingly.

Reported by Dzulqarnain Ab Fatar